THAM KOK ONN

v.

PERWIRA HABIB BANK MALAYSIA BHD

COURT OF APPEAL, PUTRAJAYA
ARIFIN ZAKARIA JCA
MOHD GHAZALI YUSOFF JCA
NIK HASHIM JCA
[CIVIL APPEAL NO: W-03-36-97]
4 NOVEMBER 2004

CIVIL PROCEDURE: *Pleadings - Limitation – Special requirement to expressly plead limitation as defence - Limitation Act 1953, s. 4 - Limitation not pleaded by defendant but raised for first time before Court of Appeal - Whether s. 4 applies to a summons - Whether 'pleading' excludes petition, summons or preliminary act - Rules of the High Court 1980, O. 1 r. 4 RHC - Whether requirement in O. 18 r. 8 RHC to plead statute of limitation as defence applies only to a writ action and not to a summons*

CIVIL PROCEDURE: *Execution - Writ of execution - Leave to issue - Application for leave made after lapse of six years from judgment date - Rules of the High Court 1980, O. 46 r. 2(1)(a) and (3) - Whether leave may be granted in view of s. 6(3) Limitation Act 1953 - Whether s. 6(3) operates at pre-execution stage or only at execution/recovery stage - Whether s. 6(3) bars granting of leave to execute under O. 46 if leave application made after six years of judgment date*

LIMITATION: *Writ of execution - Leave to issue - Application for leave made after lapse of six years from judgment date - Rules of the High Court 1980, O. 46 r. 2(1)(a) and (3) - Whether leave may be granted in view of s. 6(3) Limitation Act 1953 - Whether s. 6(3) operates at pre-execution stage or only at execution/recovery stage - Whether s. 6(3) bars granting of leave to execute under O. 46 if leave application made after six years of judgment date*

This was an appeal by the 4th defendant ('the appellant') from the decision of the learned judge dismissing his appeal against the order of the senior assistant registrar ('SAR') rejecting his application to set aside the leave to issue a writ of execution granted earlier to the plaintiff/bank ('the respondent') under O. 46 r. 2(1)(a) and (3) Rules of the High Court 1980 ('RHC'). At the hearing before the justices of appeal, the appellant abandoned the two grounds of appeal set out in his memorandum of appeal and sought leave from their lordships to put forward a point of law respecting the effect of s. 6(3)

Limitation Act 1953 ('the Act') – as interpreted by the Federal Court in *United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin* [2002] 2 CLJ 413 – upon the leave to issue a writ of execution granted earlier to the respondent. This was objected to by the respondent on the grounds that: (i) such a point was never raised before the SAR or the learned judge; and (ii) s. 4 of the Act specially requires limitation to be expressly pleaded as a defence. In rebuttal, the appellant contended that s. 4 of the Act has no application with respect to a summons because: (i) a 'pleading' does not include a petition, summons or preliminary act (O. 1 r. 4 RHC); and (ii) the requirement under O. 18 r. 8 RHC to plead a statute of limitation as a defence applies only to a writ action and not to a summons.

Held (dismissing the appellant's appeal)
Per Arifin Zakaria JCA delivering the judgment of the court:

[1] The appellant was right in his contention that s. 4 of the Act had **no** application in the present case. The respondent's objection was, therefore, overruled. (p 823 a-b)

[2a] The *ratio* of the Federal Court's decision in *United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin*, with respect to s. 6(3) of the Act, is that an action to recover the arrears of interest on a judgment debt must be brought within six years from the date on which such arrears of interest became due, that is to say, the judgment date. And, the arrears of interest recoverable is only up to a maximum of six years from the judgment date. (pp 823 d-e)

[2b] The respondent was correct in its submission that the bar in s. 6(3) of the Act did **not** apply at the pre-execution stage, and would only come into play at the execution stage. Consequently, the impugned order of the court herein would **not** be affected by s. 6(3) of the Act as it was merely an order under O. 46 RHC granting leave to the respondent to issue a writ of execution to enforce the summary judgment it had obtained earlier. After all, an application for leave to issue a writ of execution under O. 46 r. 2(1)(a) and (3) RHC must presuppose, by necessary implication, that six years or more have lapsed since the date of the judgment. Indeed, under O. 46 RHC, the court will have the power to grant leave to issue a writ of execution so long as the judgment in question is capable of being enforced – provided the execution/recovery thereof is limited to that part of the judgment which is not time-barred. (pp 823 f-h & 824 a-b)

[Appeal dismissed; order of court below affirmed with amendments.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan defendan keempat ('perayu') terhadap keputusan yang arif hakim kerana menolak rayuannya terhadap perintah penolong kanan pendaftar ('PKP') yang menolak permohonannya untuk mengetepikan kebenaran mengeluarkan writ pelaksanaan yang diberikan sebelumnya kepada plaintif/bank ('responden') di bawah A. 46 k. 2(1)(a) dan (3) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Pada pendengaran di hadapan yang arif hakim-hakim rayuan, perayu meninggalkan dua alasan rayuan yang diplidkan dalam memorandum rayuannya dan memohon kebenaran hakim-hakim untuk mengemukakan suatu perkara undang-undang mengenai kesan s. 6(3) Akta Had Masa 1953 ('Akta') – sepertimana ianya ditafsirkan oleh Mahkamah Persekutuan dalam *Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin* [2002] 2 CLJ 413 – terhadap kebenaran mengeluarkan writ pelaksanaan yang diberikan kepada responden sebelum ini. Permohonan telah dibantah oleh responden atas alasan bahawa: (i) perkara tersebut tidak berbangkit sama ada di hadapan PKP ataupun yang arif hakim; dan (ii) s. 4 Akta dengan jelas mengkehendaki supaya had masa diplidkan sebagai satu pembelaan. Perayu menjawab dengan mengatakan bahawa s. 4 Akta tidak terpakai kepada sesuatu saman kerana: (i) 'pliding' tidak termasuk suatu petisyen, saman ataupun suatu tindakan awal (A. 1 k. 8 KMT); dan (ii) keperluan di bawah A. 18 k. 8 KMT untuk memplid had masa sebagai suatu pembelaan hanya terpakai kepada tindakan writ dan tidak kepada suatu saman.

Diputuskan (menolak rayuan perayu)
Oleh Arifin Zakaria HMR menyampaikan penghakiman mahkamah:

[1] Perayu betul dalam hujahnya bahawa s. 4 Akta tidak terpakai kepada kes semasa. Bantahan responden, dengan itu, adalah ditolak.

[2a] Ratio keputusan Mahkamah Persekutuan dalam *United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin* berkaitan s. 6(3) Akta adalah bahawa, suatu tindakan untuk menuntut tunggakan faedah atas suatu hutang penghakiman hendaklah dibuat dalam masa enam tahun dari tarikh di mana tunggakan berkenaan mula menjadi terhutang, iaitu, dari tarikh keputusan. Dan, tunggakan faedah yang boleh diperolehi hanyalah setakat tempoh enam tahun dari tarikh penghakiman.

[2b] Responden betul dalam hujahnya bahawa halangan di dalam s. 6(3) Akta tidak terpakai kepada peringkat pra-pelaksanaan, dan akan hanya beroperasi di peringkat pelaksanaan. Oleh yang demikian, perintah mahkamah yang dibantah di sini tidak terjejas oleh s. 6(3) Akta, kerana ia hanyalah suatu perintah di bawah A. 46 KMT yang memberikan

kebenaran kepada responden untuk mengeluarkan writ pelaksanaan bagi melaksanakan penghakiman terus yang diperolehi sebelumnya. Walau apapun, sesuatu permohonan untuk kebenaran mengeluarkan writ pelaksanaan di bawah A. 46 k. 2(1)(a) dan (3) KMT semestinya telah mengambilkira, secara tersirat, bahawa tempoh enam tahun ataupun lebih dari tarikh penghakiman telah pun berlalu. Malah, di bawah A. 46 KMT, mahkamah mempunyai kuasa untuk memberikan kebenaran writ pelaksanaan selagi penghakiman berkenaan masih boleh dilaksanakan – dengan syarat pelaksanaan/tuntutan itu terhad kepada bahagian penghakiman yang tidak terjejas oleh had masa.

Case(s) referred to:
United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin [2002] 2 CLJ 413 FC ***(refd)***

Legislation referred to:
Limitation Act 1953, ss. 4, 6(3)
Rules of the High Court 1980, O. 1 r. 4, O. 18 r. 8, O. 46 r. 2(1)(a), (3)

For the appellant/4th defendant - Malik Imtiaz Sarwar (TS Lai); M/s Ngeow & Tan
For the respondent/plaintiff - Chang Wei Mun; M/s Raja, Darryl & Loh

[Appeal from High Court, Kuala Lumpur; No: C3796-1985]

Reported by Gan Peng Chiang

JUDGMENT

Ariffin Zakaria JCA:
This is an appeal by the appellant/fourth defendant against the order of the learned High Court Judge in dismissing the appellants appeal against the order of the learned senior assistant registrar ("the SAR") in dismissing the appellant's application to set aside the leave to execute given to the respondent/plaintiff on 23 May 1996 under O. 46 r. 2(1)(a) of the Rules of the High Court ("RHC"). On 11 May 2004 we heard submissions of counsel for both the appellant and the respondent and we reserved our decision to 12 May 2004, and on the said date we dismissed the appeal. The order of the High Court was thus affirmed but with modification. We further ordered that each party to bear his/its own costs. We now give our reasons.

The background facts leading to this application are as follows. On 23 September 1988 the respondent obtained summary judgment against the appellant for the amount due and owing to the respondent under a loan facilities granted to the first defendant (who is not a party to this appeal) by the respondent wherein the appellant stood as guarantor.

As the appellant is a Singaporean the respondent caused the judgment to be registered in Singapore. This was done on 11 September 1990. On 8 March 1991 the registration of judgment in Singapore was set aside on the application of the appellant on the ground that the registration was premature as the matter was pending appeal in Malaysia. On 1 November 1994 the Federal Court dismissed the appellant's appeal against the summary judgment. Following that the respondent registered the judgment in Singapore on 6 June 1995. On 9 February 1996 the second registration in Singapore was again set aside on the ground that the judgment was more than six years and leave to execute had not been obtained in Malaysia. The appellant then applied for leave to execute and it was duly granted on 23 May 1996. The judgment was re-registered in Singapore for the third time on 28 October 1996. The appellant appealed against the order of 23 May 1996, and since the matter is under appeal in Malaysia a stay of execution was granted by the Singapore Judge on the application of the appellant.

In the appeal before us, two grounds were advanced by the appellant in his memorandum of appeal. At the hearing before us, learned counsel for the appellant informed us that he was abandoning these two grounds and sought leave of the court to raise a point of law, that is, on the interpretation of s. 6(3) of the Limitation Act 1953 ("the Act") as found in *United Malayan Banking Corp. Bhd. v. Ernest Cheong Yong Yin* [2002] 2 CLJ 413 ("the UMBC case").

The learned counsel for the appellant submitted that looking at the order as it stands, the respondent is entitled to enforce the full judgment. This, he submitted is not permitted under s. 6(3) of the Act as interpreted in the *UMBC* case.

The respondent's counsel objected to the application by the appellant, firstly, on the ground that this point was never pleaded, raised or argued before the learned SAR, or the learned judge in the court below. He further submitted that s. 4 of the Act expressly requires the limitation point to be pleaded. Failure to do so is fatal to the appellant's case. Section 4 of the Act provides:

> **4. Limitation not to operate as a bar unless specially pleaded.**
>
> Nothing in this Act shall operate as a bar to an action unless this Act has been expressly pleaded as a defence thereto in any case where under any written law relating to civil procedure for the time being in force such a defence is required to be so pleaded.

However, learned counsel for the appellant contended that s. 4 of the Act does not apply to a summons action because by definition "pleading" does not include a petition, summons or preliminary act. (see O. 1 r. 4 RHC). Further he said the requirement to plead statute of limitation as a defence is contained in O. 18 r. 8 RHC which relates to writ action and not to a summons. Having considered the issue, we agree with the appellant that s. 4 of the Act does not apply to this case. For the above reasons we dismissed the respondent's objection on the pleading point.

The next issue in contention is whether the order of the High Court dated 23 May 1996 is rendered invalid and thus unenforceable in the light of the interpretation given by the Federal Court to s. 6(3) of the Act in the *UMBC* case. The said section provides:

> 6(3) An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

The Federal Court in *UMBC*'s case held, *inter alia*, that in view of the provision of the second limb of s. 6(3) of the Act an action to recover arrears of interest must be brought within six years of the judgment date and because of the word "arrears", it could not denote interest which was still not due. It must, therefore, mean arrears of interest at the time of recovering and could not include future interest even if the amount due had not been paid.

The learned counsel for the respondent, however, contended that s. 6(3) of the Act has no application in the present case as the order made by the High Court on 23 May 1996 was merely an order granting leave to issue a writ of execution to enforce judgment under O. 46 r. 2(1)(a) RHC; it is not an act of recovery or execution. It is also submitted for the respondent that only at the execution stage will s. 6(3) of the Act apply, and it will then become incumbent upon the judgment creditor to state how much is being executed and to ensure that that amount does not include arrears of interest of more than six years calculated from the date of judgment or any future interest.

It is further submitted that an application for leave under O. 46 r. 2(1)(a) by necessity requires a judgment to be more than six years old, and therefore, if the appellant's contentions are correct it would mean that the court has no jurisdiction to grant leave in respect of monetary judgments which carry interest. That, the learned counsel for the respondent submitted could not be the case. Having considered the issue, we agree with submissions of the learned counsel for the respondent that the proper construction to be placed

on O. 46 r. 2(1)(a) is that leave to issue execution to enforce a judgment may be granted for as long as the judgment is capable of being enforced provided that the execution or recovery should be limited to that part of the judgment which is not time barred.

For the above reasons we dismissed the appeal herein, but in the circumstances of this case, we ordered that each party is to bear his/its own costs in respect of this appeal. It is further ordered that the order of the High Court dated 23 May 1996 be amended by inserting the words, "tertakluk kepada peruntukan s. 6(3) Akta Had Masa 1953" at the end of the said order immediately following the words, "sejak penghakiman itu".